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MR. PIKE: Thank you.
BY MS. LUZAICH:
Q. It was an individual that she knew and was very familiar with it appeared?
A. Yes.
Q. Did she also tell you about, without telling me what she said, did she tell you about things that that individual did after the death of Sheila?
A. Yes.
MR. PIKE: Objection, hearsay.
THE COURT: Well, they haven't said what she said.
MS. LUZAICH: And I specifically said that, without telling me what she said.
MR. PIKE: I understand. I just want to make a record in case I bring up the same questions.
THE COURT: The next question is gonna be though.
MS. LUZAICH: No, it's not.
THE COURT: Let's hear it.
BY MS. LUZAICH:
Q. So you were you aware of that information as well?
A. Yes.

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Q. Okay. Now, did you go see this person after speaking with Debra?
A. Yes, I did. On August 24th.
Q. Okay. Now, when you went and saw this person, did you read him -- who did you go see?
A. I went and saw Mr. Flowers.
Q. You're looking over there. Do you see him here in court today?
A. Yes, I do.
Q. Can you describe where he's sitting and what he's wearing?
A. He's wearing a black suit and a maybe blew or greenish tie.
THE COURT: The record will reflect identification of the defendant Norman Keith Flowers.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. Does the defendant look the same today as he did in August of 2006?
A. Yes, he does.
Q. Or at least very similar?
A. Yes.
Q. When you spoke with the defendant, you read him his rights?

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A. Yes, did.
Q. When you do that, do you do it from memory or from a card?
A. From a card.
Q. Do you happen to have that card with you today?
A. Yes, I do.
Q. Can I have that card? May I have it marked?
MR. PIKE: It's okay. You can just read it in.
MS. LUZAICH: I'm gonna move it in actually. I am about to show defense counsel who has a copy of it, but defense counsel the actual card. State's proposed 135.
MR. PIKE: No objection.
THE COURT: It will be admitted.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. When you -- well, actually could you read into the record the rights that you read to the defendant on that day?
A. Yes. The adult advisement since Mr. Flowers was an adult at the time and still is, is number one, you have the right to remain silent.

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Number two, anything you say can and will be used against you in a court of law. Number three, you have the right to the presence of an attorney. Number four, you cannot -- if you cannot afford an attorney, one will be appointed before questioning. Do you understand these rights.
Q. Did he indicate to you that you understood the rights?
A. Yes.
Q. And did he actually sign the card in your presence?
A. Yes, he did.
MS. LUZAICH: Move it into evidence.
THE COURT: It's already been admitted.
MS. LUZAICH: Thank you.
BY MS. LUZAICH:
Q. When you saw the defendant and spoke with him, did you first tell him that you were not there to talk to him about his case?
A. Yes.
Q. Did you kind of just talk to him about hey, how are you doing, what's your name, what should I call you?
A. A little bit. Not a whole lot. He was, he was in custody. I just wanted, you know, I was

basically down there to have a talk with him.
Q. Did you -- you were aware that his name was Norman Keith Flowers.
Did he indicate that he goes by the name Norman or another name?
A. He indicated to me that he goes by Keith.
Q. And when you spoke to him, was it August 24th of 2006 at 8:30 in the morning?
A. Yes.
Q. Did you tell him that -- well, did you tell him why you were there right away?
A. I basically told him that I was conducting an investigation and I was seeking his cooperation.
Q. The interview that you conducted with him, was it tape recorded?
A. Yes.
Q. Was it then transcribed?
A. Yes.
Q. And do you have a copy of that transcript with you?
A. Yes, I do.
Q. Could you open it up just so that we can get the words correct? Okay. On page two, did you ask him the first thing I want to talk to you about,

Keith, is I'm trying to find out who a friend of yours is. Maybe a friend of yours, maybe not a friends of yours. He's a black guy, he's got like a skin condition on his arms. Does that ring a bell of anybody.
Did you ask him that?
A. Yes.
Q. How did he respond to that?
A. You're giving me limited information was his --
MR. PIKE: Objection. It's in correct.
BY MS. LUZAICH:
Q. Well, was there an answer before that?
A. What's the point -- I'm sorry, yeah. What's the point of trying to find him. Why are you trying to find him for.
Q. Did you tell him because I need to ask him some questions on a case I'm investigating and your name, Keith, the defendant's name, came up in the case that he's a friend of yours?
A. Yes. And he replied you, you're giving me limited information.
Q. Did you try and fix that a little bit and say okay, how about I start and give you some more information. Do you know Debra Quarles?

A. And there was no verbal response.
Q. None at all?
A. No.
Q. So he didn't say yeah, I know her, I dated her or anything like that?
A. No.
Q. So what did you then do?
A. I told Mr. Flowers that I wanted to show him a picture of her and asked him if it would help.
Q. How did he respond to that?
A. Yeah.
Q. So he wanted to actually see a picture of her before he would talk further?
A. Yes.
Q. Did you then show him a picture of Debra Quarles?
A. Yes, I did.
Q. And did you ask him if he knew her?
A. Yes.
Q. How did he respond to that?
A. I'm not saying.
Q. Okay. Not a lot of cooperation thus far?
A. No.
Q. Did you ask him if he thinks he knows her?

A. Yes.
Q. And did you actually tell him because she told you that she knew him?
A. Yes.
Q. How did he respond to that?
A. Again, he said I'm not saying. I mean until I know what's it about, I'm not saying anything.
Q. So then what did you say to him?
MR. PIKE: Your Honor, I move for admission of the tape recording of this, the best evidence.
THE COURT: Well, it doesn't have to, but do you have any objection?
MS. LUZAICH: Well, two. One, can we approach?
THE COURT: Yeah.
(Whereupon, an off-the-record discussion was had at the bench.)
THE COURT: All right. Go ahead. Go ahead. Page and line number, Ms. Luzaich, and you read the question Detective Sherwood asks and Detective Sherwood can read the answer that Mr. Flowers gave.
BY MS. LUZAICH:

Q. Thus far, Detective Sherwood, have you been reading exactly the responses that the defendant was giving you?
A. Yes.
Q. I for the most part was reading the questions you gave, but now we're on page three and I'm gonna read questions that you asked if that's okay with you, and if you could respond exactly the way he did.
A. Yes.
Q. Okay. I'm on page three for the record. Did you say to him after he said I'm not saying anything to you, okay, here's what I'm investigating. I'm investigating the, the death of her daughter. It's possible that someone you know may have been involved in it. And I just, I'm trying to find out who that person is, so I can go and talk to him.

I mean, Debra tells me that she's a good friend of yours and that you would probably help me, and I wanted to come talk to you and appeal to you because Debra can't rest in peace because her daughter's killer hasn't been caught.

And the reason I think it's the guy with the skin condition is just prior to Sheila

being found, there was a guy hanging out, outside the, that matches the description of him wearing like a long-sleeved shirt which it wasn't extremely cold that day. It was a long sleeved flannel shirt and I'm thinking, you know, maybe this guy is trying to hide his skin condition or something like that.

A. I don't understand what makes you guys think a person would even have a skin condition -- because they have the long shirt.

Q. Well, here's why. Because this guy, this guy that I'm looking for I was told is a friend of yours. And I was told that you gave Debra rides home from work. So maybe, maybe he saw Debra and maybe he saw Sheila and maybe he got interested in Sheila?

A. Who is Sheila?

Q. Sheila is Debra's daughter.

A. Oh, only knew her by her nickname.

Q. Pooka? Okay. So you didn't really know her well?

A. No verbal response.

Q. Okay. Anyway, you know, I'm just -- I'm trying to solve a crime that happened. And I mean, I know, I know you're probably not real anxious to cooperate with the police, but I wanted to appeal to

you as a friend of Debra's, you know, to maybe just point me in the right direction.

A. Can't do it, no. I'm not. I don't want to be involved.

Q. Okay. Well, I understand that. And I mean, you know, I can, I can find out. How well do you know Debra?

A. No, I won't answer no questions about any of that.

Q. Okay. Well, could I ask you a couple, just a couple more things, then we'll be done.

A. No. I got my own problems to deal with so I don't want to get involved in anybody else's matters.

Q. So you don't want to help Debra at all? You don't want to, you don't want to like try and help catch who killed her daughter?

A. No verbal response.

Q. Uh, really?

A. I'm not saying yes, I'm not saying no. I'm just -- I don't want to be involved in anybody else's problems. I have my own case to deal with.

Q. Okay. So as he is talking to you at this point, you're not getting any cooperation from him?

A. No.

Q. At the time of this particular conversation, were you still under the impression that there may be two suspects?

A. Yes.

Q. And is that why you're trying to find out who his friends might be?

A. Yes.

Q. And are you kind of incorporating information that you got from just a bunch of different sources?

A. Yes.

Q. Not just Debra?

A. Right.

Q. When you saw the defendant that day, how old was he?

A. 31.

Q. Do you know about how tall he was?

A. 5'7".

Q. Weight?

A. A hundred and 85, 90 pounds.

Q. After you spoke with him, were you still trying to identify the other source of semen in Sheila?

A. Yes.

Q. And in fact, did you shortly thereafter

information, that's one techniq
A. Yes.
Q. You may get somebody angry and try and get them to also give you information because they're angry?
A. Yes.
Q. That's another technique. You can go through and ask them questions that are completely unrelated to the crime that you're investigating to verify how cooperative they're going to be and that's another technique?
A. Yes.
Q. You also have been trained and informed that you can actually give them false information or lie to them about facts that you may or may not have and use that as an interrogation technique?
A. Yes.
Q. And you can also go through and appeal to their sense of humanity?
A. Yes.
Q. And in fact, you did attempt to appeal to his -- on page five. You wanted to appeal to his human decency?
A. Yes, sir.
Q. At that time in fact, Mr. Flowers advised

you that he may want to speak with you in the future, going to page seven?
MS. LUZAICH: Well, objection.
MS. WECKERLY: I object.
MS. WECKERLY: Your Honor, can we approach?
THE COURT: Yes.
(Whereupon, an off-the-record discussion was had at the bench.)
THE COURT: Objection's sustained.
BY MR. PIKE:
Q. And based upon the collection of evidence just very recently in this case, that is the nature of your work in the cold cases is that things can come to life in the future and you reinvestigate and retalk to people and that in this case and in other cases may be a very effective investigative tool?
A. I'm not sure -- I'm sorry. I'm not real sure of the question.
Q. It was kind of rambling. Let me just put it this way: It never hurts to go back and talk to potential witnesses?
A. No.
Q. And in fact, you would, would say that that constant recontact with the witnesses, the

re-evaluation what they remember often will and often times will, will bring forth that item which then opens the case wide open?
A. Yes, sir. In some cases.
MR. PIKE: All right. Thank you very much, detective.
THE WITNESS: Thank you.
THE COURT: Anything else, Ms. Luzaich?
MS. LUZAICH: Just briefly.
REDIRECT EXAMINATION
BY MS. LUZAICH:
Q. In all these times that you went back to talk to Debra knowing that there were two different sources of DNA, once you had identified the defendant Norman Flowers, were you trying to determine whether or not Debra knew who his friends were?
A. Yes.
Q. And is that because often times when people commit criminal offenses if they have somebody with them it is because it's their friend that's with them?
A. Yes.
Q. And when you talked to the defendant about the guy with the skin condition, is that

because Debra Quarles told you he had a friend with a skin condition, just couldn't remember his name?
A. Yes.
Q. Now, when, when people -- in addition, to working homicide and cold case you were a detective for many years?
A. Yes.
Q. And you were on patrol for many years?
A. No, not on patrol for very long.
Q. Well, you've been a police officer for a long time?
A. Yes.
Q. Investigated lots of different kinds of offenses?
A. Yes.
Q. You worked narcotics for quite some time?
A. Yes.
Q. People who use drugs often steal, people who steal often use drugs?
A. Yes.
Q. Now, when people steal things, do they always pawn them?
A. No.
Q. Do they often keep them themselves?
A. Yes. Or in some cases they give them to

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed.

The State obtained a conviction against Flowers based upon the improper use of bad act evidence from another murder case; by eliciting testimony about a statement he gave to detectives, while he was in custody for the other murder, even though he was represented by counsel in the other case and this case serves as an aggravating circumstance in the other case; and by commenting on his decision not to talk to the detectives or testify about this case. The conviction is also the result of the introduction of gruesome photographs from the autopsy, introduction of testimonial hearsay evidence from expert witnesses, and by prohibiting Flowers from introducing evidence that would have supported his defense.

These errors, both alone and in combination, deprived Flowers of his right to a fair trial and rendered the proceedings against him fundamentally unfair. He asks that this Court reverse his conviction and remand this case for a new trial.

II. STATEMENT OF THE CASE AND JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first degree murder, one count of sexual assault, and one count of burglary. The judgment of conviction was filed on January 16, 2009. 2 App. 250. A timely notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the

possibility of parole for sexual assault. 2 App. 255; 3 App. 640. A timely amended notice of appeal was filed on February 20, 2009. 2 App. 256. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

III. STATEMENT OF THE ISSUES

A. Whether the district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony

B. Whether the district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

C. Whether the district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel

D. Whether the district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

E. Whether the district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

F. Whether the prosecutor committed misconduct by commenting on Flowers' right to remain silent

G. Whether there is insufficient evidence to support the conviction

H. Whether the judgment should be vacated based upon cumulative error.

IV. PROCEDURAL HISTORY

On December 13, 2006, the State charged Appellant Norman Flowers with one count of burglary, one count of first degree murder, one count of sexual assault and one count of robbery. 1 App. 1. Sheila Quarles was identified in the Indictment as the victim. 1 App. 1. The State filed a motion indicating its intent to seek the death penalty. 1 App. 30, 82, 112.

On December 26, 2006, the State filed a motion to consolidate this case with the case of State v. Flowers Dist. Ct. No. C216032. 1 App. 8. Marilee Coote and Rena Gonzalez were identified as the victims in that case. 1 App. 8-12. Flowers opposed the motion to consolidate. 1 App. 21. During a hearing on April 13, 2007, the State informed the district court (Judge Mosley) that Judge Bonaventure denied the motion to consolidate the two cases. 2 App. 259. Judge Mosley indicated a desire to have the cases consolidated and asked that

the matter be heard before Judge Villani, who was assigned the other case following Judge Bonaventure's retirement. 2 App. 261-62.

On January 23, 2007, Flowers filed a motion to preclude evidence of other bad acts. 1 App. 35. The State opposed the motion. 1 App. 48. On November 5, 2007, the State filed a motion for clarification of the court's ruling. 1 App. 64. Flowers opposed the motion. 1 App. 77. On November 15, 2007, the matter was heard by Judge Bell. 2 App. 63. He ordered that a Petrocelli hearing be conducted. 2 App. 264. The hearing was held on August 1, 2008. 2 App. 267-324. The district court ruled that evidence concerning the Coote allegation was admissible but evidence concerning the Gonzalez allegation was not. 2 App. 318, 327, 332. The district court further ruled that the State could present evidence from the detective about similarities between the two cases, from the nurse and the coroner/medical examiner about the way Coote died, and DNA evidence. Other evidence concerning that case was found to be inadmissible. 2 App. 318. On September 29, 2008, Flowers filed a motion to reconsider the ruling on the motion in limine to preclude evidence of other bad acts. 1 App. 120. The district court denied the motion and allowed Flowers to make a continuing objection to the evidence. 2 App. 331-34. The district court found that the record was preserved concerning admissibility of the evidence. 2 App. 334. The district court ruled that Flowers was entitled to a cautionary instruction as the evidence was introduced and to a jury instruction. 2 App. 334. During trial, the jury was admonished that the bad act testimony was only to be considered if the jury found that it had been proven by clear and convincing evidence and should be used only to prove identity, intent, motive, and absence of mistake or accident. 2 App. 421.

On July 30, 2008, Flowers filed a bench brief. 1 App. 95.

Jury trial began on October 15, 2008. 2 App. 331. During trial, the State objected to testimony from William Kinsey, who was called as a witness by Flowers. 3 App. 541-42. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila Quarles was dating someone named Keith. 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever

personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

The parties settled jury instructions on October 22, 2008. 1 App. 146. Flowers proposed jury instructions that were not given by the district court. 1 App. 126. During settlement of jury instructions, Flowers proffered instructions on the State's failure to test speaker wires that were found at the crime scene; circumstantial evidence; other matter evidence; flight of another potential suspect; corroboration of DNA; the lesser-included offense of manslaughter; and specific intent and robbery. 3 App. 545. Flowers objected to instructions on the State's burden to prove elements of the offense of burglary, the instruction beginning "the jury must decide if the defendant is guilty"; malice aforethought; express malice; and premeditation. 3 App. 546.

Instructions were read to the jury. 3 App. 576-80. After struggling with deliberations for more than 24 hours, the jury returned verdicts of guilty on the charges of burglary, first degree murder and sexual assault. 1 App. 182-83; 3 App. 625. The jury noted on a special verdict that it unanimously found Flowers guilty of a murder committed during the perpetration of a burglary, sexual assault or robbery. It did not unanimously find him guilty of willful, deliberate and premeditated murder. 1 App. 183; 3 App. 622. The jury found him not guilty of robbery. 1 App. 183; 3 App. 622.

Following the trial phase, evidence and argument was heard by the jury concerning the penalty to be imposed for murder. The jury returned special verdicts for mitigating circumstances. 1 App. 185. It returned a verdict for life without the possibility of parole. 1 App. 186.

Following the verdicts, on October 30, 2008, Flowers filed a motion for a new trial. 1 App. 187. The motion was based upon the district court's rulings on the admission of evidence from another case and the admission of a portion of Flowers' statement to the police. The State opposed the motion. 1 App. 236. On November 18, 2008, the district court denied the motion. 1 App. 248; 3 App. 630.

The sentencing hearing was held on January 13, 2009. 3 App. 632. The judgment of

conviction was filed on January 16, 2009. 2 App. 250. A notice of appeal was filed on January 26, 2009. 2 App. 252. An amended judgment of conviction was filed on February 12, 2009. 2 App. 254. The district court sentenced Flowers to serve a term of 48 months to 120 months for burglary, a consecutive term of life without the possibility of parole for first degree murder, and a consecutive term of 120 months to life with the possibility of parole for sexual assault. 2 App. 255; 3 App. 640. An amended notice of appeal was filed on February 20, 2009. 2 App. 256.

V. STATEMENT OF FACTS

Sheila Quarles was 18 years old when she was killed by drowning in an apartment that she shared with her mother Debra and her siblings Miracle and Xavier. 2 App. 373. On the day she was killed, March 24, 2005, Sheila returned home at about 6:30 a.m., after spending the night with Qunise Toney, with whom she was in a relationship. 2 App. 375. Robert Lewis, Debra's companion, Debra and the two younger children left the apartment, so Sheila was alone in the apartment. 2 App. 375.

Qunise talked with Sheila on the phone three or four times that day. 2 App. 409. They last talked around 11:00 a.m. or 12:30 p.m. and Sheila was in a good mood at that time. 2 App. 409-11. Debra talked to Sheila about five times during the day, and Sheila sounded normal during those conversations. 2 App. 375. They last talked at about 1:00 p.m. 2 App. 375. During that call, the phone went dead and Debra tried to call Sheila, but no one answered. 2 App. 375. Qunise received a call from Sheila's phone at 1:35 p.m., but when Qunise answered the phone, no one said anything. 2 App. 410, 412. When Qunise called back, she received a voicemail message. 2 App. 410.

Debra returned home around 3:00 p.m. She called for Sheila to assist her with groceries, but Sheila did not respond. 2 App. 376, Robert came down to help Debra carry the groceries to her apartment. 2 App. 376, 385. Sheila's habit was to have the door to the apartment locked while she was inside, but on this occasion the door was open. 2 App. 376. Debra put down the groceries and realized the stereo was missing. 2 App. 376. She heard water in her bathroom, went there to turn off the water, and discovered Sheila's body in the

tub. 2 App. 376-77. On the way the bathroom, Debra noticed that her bedroom was messed-up. 2 App. 376. Debra and Robert pulled Sheila out of the hot water. 2 App. 377, 385. Debra then left the apartment and got her oldest son Ralph, who was working a few minutes away. 2 App. 377. Robert also left the apartment. 2 App. 386.

Robert told neighbors that Pooka, which is Sheila's nickname, needed help. 2 App. 368. One of the neighbors, Marquita Carr, went into the Quarles apartment, saw Sheila lying on the floor with no clothes, and had someone call 911. 2 App. 368. Carr covered the body after checking to see if Sheila was breathing. 2 App. 368. Officer Brian Cole responded to the 911 call at about 2:50 p.m. 2 App. 364. He saw Sheila's body on the bathroom floor, face up with her feet on top of the tub. He secured the scene. 2 App. 365.

Debra returned to the apartment with her son Ralph after the police and paramedics had arrived. 2 App. 377. Debra talked with detectives and told them that perhaps Qunise was the person who killed Sheila and that she could not think of any other person with whom she had any troubles. 2 App. 378. Debra went back into the apartment with a detective and noticed a whole bunch of keys. She told the detective that items were missing, including her stereo, pillow cases, Sheila' cell phone, her bank card, jewelry, and CDs. 2 App. 378.

Detective James Vaccaro was assigned to the case along with Detectives Sherwood, Long, Wildeman, and Wallace. 2 App. 389, 477. Vaccaro descried the crime scene to the jury. 2 App. 389-90. There did not appear to be a forced entry into the apartment. 2 App. 390, 478; 3 App. 510. He noticed that two pillows in the bedroom did not have pillowcases. 2 App. 392. Sheila's clothing was found in the bathroom. 2 App. 394; 3 App. 512. The police recovered underwear, jeans, and a wig. 2 App. 394. The underwear was on the outside of the jeans, were inside out and backwards. 2 App. 394, 415-16. Vaccaro stated his belief that the victim did not place her underwear on the jeans. 2 App. 394.

A crime scene analyst collected 21 samples for fingerprint examinations. 2 App. 414. Prints were found on nine of those items. 2 App. 420. None of the prints belonged to Keith Flowers. 2 App. 420. No attempt was made to lift fingerprints from the body. 2 App. 417. The police did not examine the apartment with special equipment to determine if semen or

other bodily fluids were present. 2 App. 417. No evidence of blood was found on the body or at the scene. 3 App. 511. There was no sign of a physical struggle. 3 App. 512, 515.

Items taken from the apartment, including a stereo and cell phone, were never found by police officers. 3 App. 517. Detective Sherwood tested a key that was found in the bedroom on various doors in the apartment complex but it did not fit any of those doors. 3 App. 517. He did not test the key in the lock of the apartment where Flowers stayed. 3 App. 531. The detectives did not subpoena bank records following August of 2005 to determine whether the bank card was used. 3 App. 531. Detective Long was not aware that a bank card had been stolen and was unaware of any investigation concerning its use. 2 App. 492. Sheila' telephone records were examined. 2 App. 491. The last call recorded was an incoming call on March 24, 2005 at 1: 35 p.m. 2 App. 491. The last outgoing call was to Qunise's number. 2 App. 491. Detectives did not examine cell tower records. 3 App. 531.

Vaccaro attended the autopsy. 2 App. 401. It was not immediately apparent to the coroner that Sheila's death was the result of a homicide, and the coroner did not immediately find that a sexual assault was involved. 2 App. 401. Eventually, DNA from two male sources was found on Sheila's underwear. 2 App. 406. Other clothing was not collected, so no tests were performed on those items. 2 App. 406. Vaccaro agreed with the prosecutor that "women can have sex with people consensually and later get murdered and there is not necessarily a sexual component to the homicide." 2 App. 403. Over objection, he agreed with the prosecutor's statement that "when you have an individual who has consensual sex and then maybe has lacerations to her vagina and has an additional source of DNA in her, then perhaps there might be a sexual component to the homicide." 2 App. 403-04.

The medical examiner who performed the autopsy, Dr. Knoblock, did not testify at trial. 2 App. 354. Instead his findings were presented by medical examiner Lary Simms. 2 App. 354. Simms testified that Sheila was asphyxiated by strangulation to her neck. 2 App. 350, 351. There were no ligature marks so it was likely that there was a manual strangulation or compression. 2 App. 351. There was bruising on her abdomen, an abrasion on her knee, and some lacerations in the vaginal area. 2 App. 350. The tears which appeared

in the lining of the opening of the vagina were consistent with sexual assault and did not normally happen except in a forcible kind of situation. 2 App. 350. The lacerations were made prior to Sheila's death. 2 App. 350. Based upon the absence of swelling, the medical examiner believed that the insertion which caused the laceration took place within an hour of her death. 2 App. 351. He could not determine whether the lacerations were caused by a penis or a foreign object. 2 App. 362. The presence of DNA inside the vagina did not indicate that the semen was contemporaneous with the sexual assault. 2 App. 362. It is not scientifically possible to determine which male had sex with a female first in a case where the semen of two men is identified. 2 App. 362. There was a fresh hemorrhage to Sheila's head that was consistent with a blunt force injury. 2 App. 351. She had a frothy fluid in her airways, which is a sign of drowning. 2 App. 352. Simms testified that Knoblock formed the opinion that the cause of death was drowning and that strangulation was a contributing factor. 2 App. 354. Based upon his observations in the photographs and report, Sims agreed with Knoblock's opinion. 2 App. 354. Although Flowers did not contest the cause of death, over a defense objection, the district court allowed the State to introduce photographs from the autopsy. 2 App. 353. The photographs were admitted as Exhibits 93 to 108. 2 App. 352-55; 3 App. 695a-713. They include several photographs of Sheila's tongue after it was removed from her body by the medical examiner. 3 App. 695a-704.

Linda Ebbert, a sexual assault nurse examiner, testified that in the thousands of examinations she has performed she has concluded that 65 to 67percent resulted in injuries. 2 App. 446. Injuries are often found between five o'clock and seven o'clock of the genitalia. 2 App. 446. She reviewed Sheila's autopsy report and photographs from the autopsy. 2 App. 446. There were two lacerations, one of which was significant because it was wide and deep. 2 App. 447. She believed that it was consistent with non-consensual sex. 2 App. 447, 450. On cross-examination, Ebbert acknowledged that injuries can occur during consensual sex. 2 App. 449. She did not review photographs of Sheila's cervix. 2 App. 449.

Over objection, Detective Sherwood was allowed to testify that hemorrhages to the neck and petechial hemorrhages in the eyes were findings consistent with strangulation. 3

App. 520. He participated in other investigations where strangulation was the cause of death. 3 App. 520. He was present when vaginal, anal, and oral swabs were collected during the autopsy. 3 App. 520. He requested that the swabs be tested for DNA and requested comparison to swabs taken from Qunise Toney and Robert Lewis. 3 App. 520. On cross-examination, Detective Sherwood acknowledged that he was not a doctor and basically went by what others told him. 3 App. 532.

DNA tests were conducted by Kristina Paulette. 3 App. 547. Sheila's vaginal sample showed a mixture belonging to Sheila and two males. 2 App. 548. Robert Lewis and Qunise Toney were excluded as a sources of the samples. 3 App. 549. She identified Flowers as the probable source of one of the male samples. 3 App. 549. She did not obtain any foreign results from samples taken of Sheila's fingnails or a Gatorade bottle. 3 App. 550. A sperm sample consistent with Flowers was found on Sheila's underwear. 3 App. 551.

Detective Sherwood testified that he learned there were two different sources of DNA inside of Quarles, one of which was identified as belonging to Norman Flowers. 3 App. 522. He realized that there was another detective who had a suspect by that name on a different case. 3 App. 522. Over a hearsay objection, he was allowed to testify that he looked at a homicide notebook by Detective Tremel and found that there was another victim who had been strangled and violently sexually assaulted by Flowers. 3 App. 523.

Sherwood contacted Debra and then contacted Flowers, who was in custody on another matter. 3 App. 524. Flowers was given his Miranda rights. 3 App. 714. He talked with the detective after being told that they would not discuss the case for which he was in custody. 3 App. 525, 665. Flowers would not give a response when asked if he knew Debra Quarles and indicated that he knew Sheila Quarles by her nickname, Pooka. 3 App. 526. He told the detective that he did not want to be involved and would not answer any questions about the Quarles case. 3 App. 526.[1]

[1]The testimony concerning this matter is set forth in full in the Appendix as it is relevant to Flowers' contention that the district court erred in failing to suppress this evidence.

In 2008, Paulette tested a sample from George Brass and found that he was a probable source of samples from Quarles' vagina and underwear. 3 App. 551. Detective Sherwood investigated the source of the second semen sample and learned from Detective Long that the source had been identified. 3 App. 527. George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass.[2] 3 App. 556.

Debra knew both Flowers and Brass. 2 App. 373. Flowers dated Debra for about four months in 2004. 2 App. 378. Flowers knew Sheila and Debra's other children. 2 App. 378. She saw Flowers at her apartment complex about two weeks prior to Sheila's death. 2 App. 379. At that time, Debra and Sheila were sitting outside near their apartment. 2 App. 379. They asked Flowers what he was doing there and he said that he worked as a maintenance man at a couple of the apartment complexes owned by the landlord. 2 App. 379. They talked for about 20 minutes. 2 App. 379.

Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. Debra knew that Brass and Sheila were friends, but did not know of any sexual relationship between them. 2 App. 374.

Following Sheila' death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379. Flowers recommended

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[2] George Schiro, a DNA expert, testified that it is possible to have a false "hit" when evaluating DNA in a case where a mixture is present. 3 App. 558. As the Quarles case, it would be expected that between 40 and 130 people in the Las Vegas valley would have the same profiles as those attributed to Flowers and Brass. 3 App. 558. It is not possible to determine from DNA how long a sperm sample has been present or in which order two sperm samples were deposited. 3 App. 558. Other clothing could have been examined to establish a timeline as to when the semen was introduced. 3 App. 559.

a psychiatrist and drove her to the two appointments she attended. 2 App. 379.

Debra stated that Flowers did not ever tell her that he had a sexual relationship with Sheila or that they went out. 2 App. 379. Debra believed that Sheila did not like older men. 2 App. 379. She did not ever see Flowers and Sheila together. 2 App. 379. On cross examination, Debra acknowledged that Sheila did not tell her about the sexual relationships she had with with Qunise Toney or George Brass. 2 App. 380. Qunise also testified that she had never met or talked with Sheila's mother, despite the fact that Qunise and Sheila were in a relationship for several months. 2 App. 412.

Brass also contacted Debra and her family at their new apartment following Sheila's death. 2 App. 381. He did not ever tell Debra that he had been having a sexual relationship with Sheila. 2 App. 382. Robert Lewis, who is Brass's uncle, saw Brass at the apartment at lunch time on the day that Sheila was killed. He thought he saw Brass around 11:20 or 11:30. 2 App. 387.

Brass testified that he knew the whole Quarles family and was good friends with Sheila's brother Ralph. 2 App. 493. Brass claimed that he had a sexual relationship with Sheila. 2 App. 494. He lived with his mom in Sheila's apartment complex. 2 App. 494. He claimed that he had vaginal sex on the living room floor with Sheila between 10:30 a.m. and 11:15 a.m. 2 App. 494-96. They were together for twenty minutes, at the most. 2 App. 495. Sheila did not receive any phone calls while Brass was there. 2 App. 496. His uncle was outside of Sheila's apartment when he left. 2 App. 496.

Brass claimed he then went to work at Super Wal-Mart, at Craig and Clayton. 2 App. 494. He usually swiped his ID badge when he arrived and when he left. 2 App. 494. He believed that he took a lunch break that day. 2 App. 495. He usually had lunch with his grandma, about seven blocks away from Wal-Mart. 2 App. 495. His mother called him at work that day and he also received a call from Ralph. 2 App. 495. He left work and went to his mother's apartment. 2 App. 495. He did not clock out when he left. 2 App. 496. Gabriel Ubando, an assistant manager at Wal-Mart, identified Brass's time records for March 24, 2005. 2 App. 498. The records indicated that George clocked in at 12:04 p.m., went to

lunch at 4:04 p.m., came back at 5:03 p.m. and left work at 7:45 p.m. 2 App. 488. It's possible that another employee could have clocked him in and out and its also possible that an associate manger could change the times in the system. 2 App. 498. There was no indication that anyone changed Brass's time record. 2 App. 498.

Police officers asked Brass a few questions on the day Sheila was killed. 2 App. 495. They did not record the conversation. 2 App. 495. Others present were his uncle, mother, sister, grandmother, and his father. 2 App. 496.

Some time after Sheila's death, about two or three years later, the police talked to Brass about his sexual relationship with her and the fact that he had sex with her the morning she was killed. 2 App. 497. He did not tell them about that fact the day she was killed because they did not question him about it, and it did not occur to him that it would be helpful to the police to know that information. 2 App. 497. Upon determining that George Brass was not a suspect, the location of his sexual intercourse with Quarles was no longer relevant to the detectives. 2 App. 404. Police officers did not compare Brass's fingerprints to prints found at the scene. 2 App. 421. Ameia Fuller, Sheila's cousin, testified that she talked with Sheila by telephone shortly before Sheila died. 2 App. 492. Sheila told her that she was friends with Chicken (Brass). 2 App. 493. Ameia provided this information to a detective who called her. 2 App. 493.

Other suspects and leads were not thoroughly explored by the detectives. For example, a stereo was stolen from the Quarles' apartment on the day Sheila was killed.[3] 2 App. 374, 492. Detectives were aware that another burglary took place in the apartment complex on the day that Sheila was killed. 2 App. 406, 481. No suspect was arrested for that offense. 2 App. 406, 482. Fingerprint samples from other possible suspects were not requested. 2 App. 421.

Debra informed the detectives that there was an older man who had just moved into

[3]As noted above, Flowers was charged with robbery based upon the theft of the stereo. The jury acquitted him of this offense.

the apartment complex who had just gotten out of prison. 2 App. 380. There was an occasion, about a month prior to Sheila's death, when the old man knocked on their apartment door and asked Debra's daughter Miracle to get Sheila. 2 App. 380. Debra told the old man Sheila's age and told him to stay away from her house. 2 App. 380. She gave police officers the name of "Darnell" and gave them a description of the man. 2 App. 381-82. The detectives were unable to determine who this person was based upon their interviews with neighbors. 2 App.483. Detective Sherwood claimed that Detective Long investigated this lead and it turned out to be nothing. 3 App. 522.

Robert Lewis voluntarily gave a DNA sample and talked to police officers for about an hour, but they did not take a handwritten statement from him. 2 App. 386-87, 480-81; 3 App. 531. The detective did not check Robert's name with pawn shops to see if he had pawned any items. 3 App. 532. Robert saw a nephew, Anthony Culverson at Sheila's apartment on the day she was killed. 2 App. 387. Culverson, who was in custody of the state prison at the time of trial, testified that he is Brass's cousin and was aware that Brass and Sheila saw each other on and off. 2 App. 474.

Detective Sherwood talked with Debra a number of times and asked if she knew of Sheila having any boyfriends. 3 App. 532. No male names were given. 3 App. 532. There was a letter to William Kinsey on a bed in the apartment. 3 App. 532. Several months prior to trial, Sherwood met with Kinsey. 3 App. 532. Sherwood opined that Kinsey was not cooperative. 3 App. 532. The detective was aware that the letter was addressed to Kinsey and was from "Sheila Kinsey." 3 App. 533. Kinsey was in custody when Sheila was killed and was therefore not a suspect. 3 App. 536. He testified that Sheila was his girlfriend. 3 App. 584. He has been in custody since December, 2004. 3 App. 584. Sheila visited Kinsey and wrote to him while he was in custody. 3 App. 584.

Natalia Sena lived in the Palm Village Apartments in March of 2005. 3 App. 565. She told officers that she saw a tall, skinny man in a flannel shirt near Quarles' apartment on the day she was killed. 3 App. 566. She also saw Chicken (Brass) that day and believed she saw him both before and after 12:00 p.m.. 3 App. 566. Chicken was with the tall, skinny

man. 3 App. 566. They were at Quarles' apartment. 3 App. 566. He was creeping around and looking to see who was around. 3 App. 566. On the day Sheila was killed, Jesse, the cousin of the father of Sena's child, was living with Sena. 3 App. 567. Sena was arrested that day and when she returned two or three days later she saw Jesse outside with a radio. 3 App. 567. She recalled that the radio had detachable speakers and she asked him where he got it. 3 App. 567. Jesse told her he got it from the girl's downstairs apartment. 3 App. 567. Drugs were missing from her apartment when she returned from jail. 3 App. 567. On cross-examination, Sena acknowledged that she used crystal meth every day in March, 2005. 3 App. 568. Sena was sure that she saw Chicken at about noon. 3 App. 568. She believed that she heard the deceased girl's mom scream about an hour or less later. 3 App. 569. She did not see the man in the girl's apartment or see him walk out of the apartment. 3 App. 569. She saw the man in the girl's doorway. 3 App. 570. It was possible that she was coming from the apartment next door. 3 App. 570.

Veronica Sigala, the assistant manager of the Palm Village Apartments, testified that she worked at the apartment complex in March, 2005. 3 App. 571. Flowers did not ever work in the maintenance department while she was there. 3 App. 571. He did not work in any other capacity at the complex. 3 App. 572. She identified the photograph of another man, Mr. Nararo, who stayed with people in the apartment complex. 3 App. 572-73. She saw that man break into apartments. 3 App. 572. She called the police regarding the man three or four times and she also told the man to leave seven or eight times. 3 App. 572. She did not see him in Quarles' apartment. 3 App. 573.

Martha Valdez testified that she moved into the Palm Village apartments near the end of March 2005. 3 App. 573. On the first or second day that she moved into her apartment, a man entered into her apartment. 3 App. 574. She saw him in the doorway of her bedroom, told him she was going to call the police, and he ran out of the apartment. 3 App. 574. She identified a photograph of the man. 3 App. 575. The next day she saw police at her apartment complex and learned they were investigating the death of the girl. 3 App. 575

Extensive evidence was presented concerning the murder of Merilee Coote.

Following an admonition by the district court, the jury heard evidence from Monica Ramirez. 2 App. 422. She worked at an apartment complex at 6650 Russell, which was not the complex where Sheila was killed. 2 App. 422. On May 3, 2005, she conducted a welfare check on one of her residents, Merilee Coote. 2 App. 422. Ramirez and her assistant Michelle Craw went to the apartment and found Coote on the living room floor. 2 App. 422. She was not wearing any clothing. 2 App. 422. They contacted 911. 2 App. 423.

Officers responded to Coote's apartment. 2 App. 424. They found that the lights were on and the television was tuned to a pay per view information channel listing pornographic movies. 2 App. 424. Coote's legs were spread, she was wearing one earing and another was on the floor, some of her public hair was burned, and there was an incense stick in her belly button. 2 App. 424, 439. There were some ashes between her legs, under her vaginal area. 2 App. 424. Some of the carpet was burned and there was an area of apparent blood adjacent to the burned carpet. 2 App. 431. Biological fluids were found only in the carpet area in front of a love seat. 3 App. 507. Officers saw a reaction on the carpet near the burned area, which had a floral type odor, similar to fabric softener. 2 App. 431, 436. It appeared that someone had placed a contaminant in the area in an attempt to hide evidence. 2 App. 431. Inside of a washing machine, officers found a purse and its contents, a knife, a daily planner, ice cube trays and other items. 2 App. 424, 430. In the master bedroom, the bathtub was full of water. There were some makeup items, jewelry, clothing and newspaper in the tub and it was all covered up with a blue towel. 2 App. 424, 429. It appeared that the shower and washing machine were wiped down. 2 App. 432. Photographs of the crime scene were admitted. 2 App. 428. There was no forced entry. 2 App. 429, 439. The cause of death was not immediately apparent to the police as there were no gunshot or stab wounds or injuries of that nature. 2 App. 440.

An autopsy was performed on Marilee Coote by Dr. Knoblock.[4] 2 App. 355. He did

[4]Flowers objected to testimony concerning this matter. 2 App. 355. The district court noted the continuing objection. 2 App. 355.

not testify at trial. Instead his findings were presented by Lary Simms. 2 App. 355-56.

Sims testified that Knoblock found that Coote was 45 years old at the time of her death. 2 App. 355. There were signs of asphyxiation and she had some contusions on her arms. 2 App. 355. There were also areas of superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks. 2 App. 355. It appeared that a hot object was applied to the skin. 2 App. 355. It appeared that the burns occurred at about the time of death. 2 App. 356. He could not determine whether the burns were pre-mortem or post-mortem. 2 App. 356. There was a small abrasion behind her ear, superficial tears on the opening of the vagina, a tear on the opening of the anus and some hemorrhages on her skull and neck. 2 App. 356. Coroner Sims believed the tears to be consistent with sexual assault. 2 App. 356. The hemorrhaging on the anus indicated pre-mortem penetration. 2 App. 356. The hemorrhages on the skull indicated blunt trauma that was contemporaneous with Coote's death. 2 App. 356. The injuries to her neck indicated there was manual strangulation. 2 App. 357. The cause of death was strangulation. 2 App. 359, 440.

Officers returned to the apartment the following day and learned that Coote's son had broken the crime scene barrier tape and had been inside of the apartment. 2 App. 441. They had carpeting removed to test for DNA evidence. 2 App. 441. Officers learned that Coote's car was missing. 2 App. 441. The car was recovered but the keys were not located. 2 App. 442. The car was processed for fingerprints but no prints were found. 2 App. 443.

During the course of their investigation, officers learned that Flowers' girlfriend lived in the same apartment complex as Coote and her apartment was across the porch or walkway from Coote's apartment, 2 App. 442. A DNA sample was collected from Flowers. 2 App. 442. DNA samples were also recovered from Coote and the carpet. 2 App. 442.

A fingerprint examiner testified that he attempted to develop tests on numerous items recovered from Coote's apartment, including items found in the washing machine and tub, but he was unable to recover any latent prints from these items. 2 App. 452. He recovered numerous prints from Coote's car and examined them against exemplars from Flowers and several other people. No prints were identified as belonging to Flowers. 2 App. 453. Three

prints did not match any of the exemplars submitted. 2 App. 453.

Consuelo Silva Henderson, a long time friend of Coote's, did not believe that Coote would have put ice cube trays or the contents of her purse in a washing machine, or put bills or other items in a bathtub. 2 App. 444. She did not know Coote to watch pornography. 2 App. 444. Coote did not have a boyfriend while living in Las Vegas. 2 App. 444.

Juanita Curry, a neighbor of Coote's, testified that while emergency personnel were coming downstairs from Coote's apartment, Flowers knocked on her door and indicated that he wanted to come into her apartment. 3 App. 509. She had met him before through a mutual friend and had helped Curry move items into her apartment. 3 App. 509. He said that the police made him nervous. 3 App. 509.

Linda Ebbert reviewed the autopsy report concerning Coote. 2 App. 447. She found three lacerations, between five and seven o'clock, and concluded that they were consistent with non-consensual sexual intercourse. 2 App. 447. She believed the evidence was consistent with non-consensual penetration of the anus. 2 App. 448.

Over a hearsay objection, Paulette testified concerning a DNA report concerning Merilee Coote's vaginal sample.[5] 3 App. 551-52. She testified that another DNA analyst, Thomas Wahl, found that the source of the semen found in Coote's sample was Flowers. 3 App. 551-52. She testified that she could state the identity because there was a single source or a major profile in the sample. 3 App. 552. She testified that the profile generated was rarer than one in 650 billion. 3 App. 552. Flowers was also identified as the source of a rectal sample collected from Coote and of a stain on the carpet of her apartment. 3 App. 552. After examining Wahl's findings, she looked at the carpet stain and found that there was some sort of detergent on the carpeting. 3 App. 553. She concluded that the stain on the carpet was from Flowers' semen. 3 App. 553.

[5]In a voir dire examination, Flowers' counsel elicited testimony that the records were kept as business records with her lab. 3 App. 551.

As noted above, based upon this evidence the jury found Flowers guilty of first-degree murder under a felony-murder theory. The jury also found him guilty of burglary and sexual assault. He was acquitted of the robbery charge.

V. ARGUMENT

A. The district court violated Flowers' constitutional rights by allowing the State to introduce unrelated prior bad act testimony.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce prior bad act evidence of another murder which was not relevant and which was highly prejudicial. Flowers' constitutional rights were further violated because the State presented bad act evidence in excess of that permitted by the district court's order. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). See also Fields (John) v. State, __ P.3d __ (Nev. 2009). Flowers submits that the admission of propensity evidence violates his state and federal constitutional rights of due process. See Estelle v. McGuire, 502 U.S. 62, 75 n.5 (1991) (recognizing but reserving the issue). Constitutional error is evaluated under the harmless error standard. Erroneous admission of evidence in violation of the Due Process Clause is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 23-24 (1967).

2. The district court abused its discretion in admitting prior bad act evidence.

The district court allowed the State, over a continuing defense objection, to introduce evidence concerning the murder of Marilee Coote. The State alleged that Flowers killed Coote and claimed that the Coote evidence was relevant to proving the identity of the person who killed Sheila Quarles. In support of its motion to introduce this evidence, the State

noted that Sheila died two months prior to Coote; DNA belonging to Flowers was found among the DNA identified on Quarles' vaginal sample, and DNA identified to Flowers was found in Coote's vaginal and rectal swabs. 1 App. 12-13.

> NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put – whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." Ledbetter, 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16.

Fields, __ P.3d at__. Flowers submits that the State failed to establish the admissibility of the Coote murder under these three prongs.

First, there were substantial differences between the two incidents: Sheila was 18 years old at the time of her death, while Coote was 45 years old. 2 App. 355, 373. Coote had superficial burning and thermal injury on her pubic hair and on the skin around her genitals and buttocks, while Sheila did not have any such injuries. 2 App. 355. Coote had injuries to her anus, while Sheila did not. 2 App. 356. Sheila drowned to death while Coote's cause of death was strangulation. 2 App. 359, 440. Coote's car was missing, while no similar item belonging to Sheila was taken. 2 App. 441. In Coote's apartment, police officers found unusual items in the washing machine and tub, while no similar evidence was found in Sheila's apartment. 2 App. 452. Pornography was playing on the television in Coote's apartment, but not in Sheila's apartment. 2 App. 444. In Coote's case, police officers found detergent on a stain on the carpet, but did not find anything similar in Sheila's apartment. 3 App. 553. Flowers was seen near Coote's apartment on the day Coote was killed, while no one testified that Flowers was present at Sheila's apartment on the day Sheila was killed.

3 App. 509. Finally, the evidence established that Flowers knew Sheila, but there was no testimony that Flowers knew Coote. 2 App. 378. The lack of similarities in the two cases negates the relevance of the evidence concerning the Coote case. Under these circumstances, the district court abused its discretion in finding the Coote evidence to be relevant to the State's charges against Flowers in which Sheila was identified as the victim.

Second, the probative value of the evidence from the Coote case was substantially outweighed by the danger of unfair prejudice to Flowers. Presentation of evidence concerning the Coote case was a substantial portion of the evidence presented at trial. The State presented evidence from the apartment manager who discovered her body, officers who responded to the scene, a medical examiner concerning the autopsy, a fingerprint examiner, an expert in DNA, Coote's friend, and Coote's neighbor. In essence, the State presented a second trial concerning Coote within the trial concerning Sheila. Further, extensive argument about the Coote case was made during closing arguments. 3 App.597-98, 611-12. By its very nature, evidence of another murder is highly prejudicial. Under these circumstances, the district court abused its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice to Flowers.

Finally, the nature and quantity of the evidence supporting Flowers' conviction beyond the prior act evidence is incredibly weak. A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Thus, the prejudice to Flowers was great as there is a substantial likelihood that he would not have been convicted had evidence concerning the Coote case not been introduced. The judgment of conviction should therefore be reversed.

3. The district court erred in allowing the State to present evidence beyond that provided for by the district court's order.

In ruling on the Flowers' motion to exclude evidence of other bad acts, the district court ruled that the State could present evidence from a detective about similarities between the two cases, from the nurse and coroner/medical examiner about the way Coote died, and DNA evidence, but other evidence concerning the case was found to be inadmissible. 2 App. 318. Specifically, the district court ruled:

> You can put on the Coote case to show intent to and to show identity by talking to the detective about the similarities in the case, the nurse and the coroner/medical examiner about the way she died, the similarities in vaginal tearing, and the DNA profile person, and then that's as far as the State is going.

2 App. 318-19. Despite this order, the State presented evidence from the apartment manager who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's who testified that Coote did not watch pornography and did not have a boyfriend. 2 App. 444. Flowers made a continuing objection to all of the evidence concerning the Coote case, albeit not on the ground that the district court abused its discretion in allowing the State to introduce evidence beyond that provided for in the district court's order. 2 App. 334.

The district court made a firm ruling on the scope of the evidence which could be presented by the State concerning the Coote case. The State was obligated to follow this ruling. The district court abused its discretion in allowing the State to present this additional evidence. Flowers was prejudiced by the introduction of this evidence as it further emphasized the prejudicial evidence suggesting the Flowers was involved in another murder.

B. The district court violated Flowers' constitutional rights by allowing testimony to be introduced in violation of Crawford v. Washington and Commonwealth v. Melendez-Diaz.

Flowers's state and federal constitutional rights to due process, confrontation and cross-examination were violated because the district court allowed the State to introduce testimonial hearsay evidence. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. Chavez v. State, 213 P.3d 476, 484 (Nev. 2009) (citing Mclellan v. State, 124 Nev. __, 182 P.3d 106, 109 (2008)). "However, whether a defendant's Confrontation Clause rights were violated is 'ultimately a question of law that must be reviewed de novo.' Id. (quoting U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007)). The federal courts follow this same standard. Alleged violations of the Sixth Amendment's Confrontation Clause are reviewed de novo. See Lilly v. Virginia, 527 U.S. 116, 136-37 (1999). Confrontation Clause violations are subject to harmless error analysis. See U.S v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004). That is, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers' rights of confrontation and cross-examination were repeatedly violated as the State presented the findings of experts who conducted examinations for the prosecution without calling those experts as witnesses.

Flowers' constitutional rights were violated as the district court allowed the State to present the findings of expert witnesses who did not testify at trial. Specifically, Dr. Knoblock, the medical examiner who performed the autopsies on Sheila and Coote did not testify at trial. Instead, Dr. Knoblock's findings were presented by medical examiner Lary Simms. 2 App. 350-62. Also, DNA expert Paulette testified about a DNA examination conducted by another DNA analyst, Thomas Wahl. 2 App. 551-53. No explanation was provided for the absence of either Knoblock or Wahl and no effort was made to establish that they had previously been subject to cross-examination and confrontation by Flowers.

The district court erred in allowing the State to present the findings of expert witnesses without requiring those experts testify at trial. In doing so, the district court violated Flowers' rights under Crawford v. Washington, 541 U.S. 36 (2004), as this was testimonial hearsay evidence and inadmissible under these circumstances. See also City of Las Vegas v. Walsh, 121 Nev. 899, 906, 124 P.3d 203, 208 (2005).

This issue was recently considered by the United States Supreme Court. In

Commonwealth v. Melendez-Diaz, 129 S.Ct. 2527 (2009), the Supreme Court found that admission of a laboratory analysts' affidavits violated the defendant's right of confrontation:

> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id. at 2532 (alteration in original) (quoting Crawford, 541 U.S. at 54).

As in Melendez-Diaz, evidence of the autopsy and DNA tests allegedly conducted here were admitted, even though the experts who performed the examinations did not testify at trial. Flowers was denied the opportunity to question these experts about their methodology, competence as experts, and other factors relevant to the weight and admissibility of the testimony provided via Sims and Paulette. As set forth at length in Melendez-Diaz, findings by expert witnesses must be subject to confrontation:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." Id., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution.
>
> Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, post, at 10, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as Amicus Curiae 15-17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.
>
> Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he

> legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded: "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original). Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Melendez-Diaz, 129 S. Ct. at 2537 (footnote omitted). Under this authority, there can be no question that Flowers was entitled to cross-examine the expert witnesses and it was constitutional error to admit hearsay statements of these examinations.

The violation of Flowers' constitutional right of confrontation having been established, it is the State's obligation to prove that the error was harmless beyond a reasonable doubt. See Idaho v. Wright, 497 U.S. 805, 827 (1990). The State cannot do so as this evidence was crucial to the State's case. The judgment must therefore be reversed.

C. The district court violated Flowers' constitutional rights by admitting as evidence a statement given by Flowers to detectives following invocation of his right to remain silent and right to counsel.

Flowers's state and federal constitutional right to due process, right to a fair trial, rights to remain silent and right to counsel were violated because the district court allowed the State to introduce evidence of statements made by Flowers at a time when he was represented by counsel, and had invoked his right to remain silent, in a case for which the conviction here serves as an aggravating circumstance. His constitutional and statutory rights were also violated because the district court prohibited Flowers from introducing his whole statement to the police after the State had introduced a portion of the statement. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

A trial court's decision to admit or suppress a statement that may have been obtained in violation of Miranda is reviewed de novo. See U.S. v. Rodriguez-Rodriguez, 393 F.3d

849, 855 (9th Cir. 2005). In considering a Sixth Amendment claim, this Court reviews under the clearly erroneous standard with respect to the underlying factual issues but de novo with respect to the ultimate constitutional issue. U.S. v. Johnson, 4 F.3d 904, 910 (10th Cir. 1993).

2. The district court erroneously allowed the State to introduce evidence of Flowers' statements to the police which were obtained in violation of Miranda and Massiah.

The district court erred in admitting evidence of Flowers' statement to police officers because he was in custody, had been formally charged, and was represented by counsel for a murder charge in the case involving Coote, at the time he was interrogated by police officers in this case. While Flowers recognizes the general rule that police officers may interrogate a person who is in custody for an offense which has not yet been charged, he submits that this general rule does not apply in a case such as this because the conviction for murder in this case is an aggravating circumstance in the other case.

Outside the presence of the jury, Flowers objected to the State's introduction of his statement to detectives. 3 App. 505. His counsel noted that Flowers was in custody on the other case and counsel represented him on that case. 3 App. 505. Counsel was unaware that the detectives planned to interrogate Flowers. 3 App. 505-06. The State informed the district court of its intent to introduce a portion of the statement for the purpose of showing that Flowers was evasive and that he knew Sheila only by her nickname, Pooka. 3 App. 506. The State noted that charges in this case had not been filed. 3 App. 506. Flowers contended that the State's recitation of the law "may be the status of the law now, but I think we need to make a record that that isn't what it should be." 3 App. 506. The district court noted the objection and found the statement to be admissible. 3 App. 506.

The relevant procedural history of the two cases was provided in Flowers' opposition to the State's motion to consolidate. 1 App. 206. Flowers was charged in the Coote case on June 7, 2005. 1 App. 206. Counsel was appointed for Flowers and he entered a plea of not guilty at his arraignment on August 30, 2005. 1 App. 207. On November 8, 2005, Flowers received a Notice of Intent to See Death Penalty, which included an aggravating

circumstance for two or more convictions for murder. 1 App. 207. He was interrogated by police officers in this case on August 24, 2006. 3 App. 524, 665. The detective informed Flowers that "we're not going to discuss your case at all" but did not inform him that evidence obtained concerning the murder of Sheila could be used to establish a conviction for that case and that such a conviction could be used as an aggravating circumstance in the pending case involving Coote. The State introduced evidence of Flowers statement to the detectives. It is reproduced as an Exhibit to this brief at pages 1-4.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Supreme Court explained when this right arises:

> The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Id. at 175 (citations and internal quotations omitted). Accordingly, the Court held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses. See id. at 176. See also Maine v. Moulton, 474 U.S. 159, 180 (1985); Texas v. Cobb, 532 U.S. 162 (2001); Dewey v. State, 123 Nev. __, 169 P.3d 1149, 1152 (2007).

It does not appear that this Court, the United States Supreme Court or any other court has considered this issue in the context presented here, which involves an interrogation on a second case for which the defendant has not been charged, but for which it is easily foreseeable, that a conviction in the second case would serve as an aggravating circumstance in the first case for which the defendant has been charged. In other words, because the second case is part of the first case, in that a conviction from the second case can be used as an aggravating circumstance in the first case, the general rule established in McNeil, Moulton, and Cobb does not apply.

Support for this argument is found in the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 482-85 (2000) (any fact that increases the penalty for a crime

beyond the statutory maximum must be submitted to a jury) and Ring v. Arizona, 536 U.S. 584 (2002) (extending Apprendi to capital cases). In essence, the conviction obtained here, which was based in part upon Flowers' statements to the detectives, is an element of the capital charge pending in the Coote case. Accordingly, this case is an essential part of the Coote case, the detectives were wrong in informing Flowers that their interrogation did not in fact involve the Coote case, and the district court erred in allowing the State to present evidence of Flowers' statements to the detectives without first conducting a full hearing as to their admissibility under Massiah v. U.S., 377 U.S. 201 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966).

3. The district court abused its discretion in prohibiting Flowers from introducing his entire statement after the State introduced a portion of his statement.

As noted above, the State elicited evidence about a portion of Flowers' statement to the detectives. On cross-examination, Flowers attempted to elicit testimony about additional statements made by Flowers during the interrogation. 3 App. 534; Appendix pg. 4. Specifically, in response to the State's questions on direct implying that Flowers was not cooperative and was evasive with the detectives, Flowers counsel asked the detective whether Flowers advised the detective that he may want to speak with the detective in the future. 3 App. 534; Appendix pg. 4. The State objected to this testimony, there was a discussion off the record, and the district court sustained the objection. 3 App. 534; Appendix page 4. Later, a record was made concerning the court's ruling. 3 App. 540. The State noted that it stopped its examination at page five of the transcript of the statement, prior to Flowers statement that he had to talk with his lawyer before he did anything and that maybe his lawyer would let him talk to the detectives. 3 App. 541. Flowers' counsel noted that he wished to elicit this testimony to counter the implication from the State's examination that Flowers was evasive and unwilling to cooperate. 3 App. 541. The district court held that it "was trying to protect the defendant is all" and that "there is a potentially negative inference that can be drawn against the defendant for doing something he's absolutely entitled to do. And I think that it's in the defendant's best interest [not] to let it in and that's

why I said you couldn't bring it in." 3 App. 541.

NRS 47.120(1) provides that "when any part of a writing or recorded statement is introduced by a party, he may be required at that time to introduce any other part of it which is relevant to the part introduced, and any other party may introduce any other relevant parts." See also Domingues v. State, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996) (district court abused its discretion in limiting a detective's testimony regarding his interview of the defendant by prohibiting the defendant from introducing other relevant parts of the interview).

The State elicited testimony from a detective that Flowers was evasive and uncooperative. Flowers' counsel made a strategic decision that the best way to contest the State's evidence was to elicit testimony from the detective that Flowers stated he might be willing to talk to the detectives, but he wished to consult with his counsel before doing so. Flowers had a constitutional right to confront the State's evidence, and a statutory right to introduce the relevant portions of his statement to the detective after the State introduced part of the statement. Chambers v. Mississippi, 410 U.S. 284, 294 (1973); NRS 47.120. The State improperly interfered with the strategic decision of Flowers' counsel by objecting to this evidence. The district court erred in substituting its own judgment for that of Flowers' counsel as to whether this testimony should be presented, and erred in refusing admission of this important evidence.

Flowers was prejudiced by the district court's decision because the jury was precluded from hearing Flowers' statement that he might be willing to discuss Sheila's death, but he wanted to talk with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during closing arguments the State repeatedly emphasized Brass's cooperation with the detectives and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App. 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these arguments would have had far less impact upon the jury. As a matter of fundamental fairness, Flowers was entitled to present this evidence and the district court's exclusion of this evidence warrants reversal of the conviction.

D. The district court violated Flowers' constitutional rights by admitting gruesome photographs from the autopsy.

Flowers's state and federal constitutional rights to due process and right to a fair trial were violated because the district court allowed the State to introduce gruesome photographs of body parts dissected by the medical examiner during the autopsy. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews the district court's decision to admit photographs, over objection, for an abuse of discretion. Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083 (1978). The admission of gruesome photographs may so infect the proceedings with unfairness that there is a denial of the federal constitutional right of due process. Spears v. Mullin, 343 F.3d 1215, 1226 (2003). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. The district court abused its discretion in allowing the State to admit evidence of photographs from the autopsy which showed the deceased's tongue after it had been cut out of her body by the medical examiner and gruesome photographs of other body parts.

Gruesome photographs are admissible if they ascertain the truth, such as when used to show the cause of death, the severity of wounds, and the manner of injury. Doyle v. State, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000). This Court has found that the mere fact that the defendant does not dispute the cause of death does warrant exclusion of autopsy photographs. Id. at 161, 995 P.2d at 473. In Dearman v. State, 93 Nev. 364, 369-70, 566 P.2d 407, 410 (1977), this Court approved of a district court's admission of photographs after the district court reviewed the offered photographs outside the presence of the jury, sustained the defense's objection to some of the photographs, heard testimony by the pathologist that the photographs would be helpful to him in explaining the cause of death, and considered the admissibility of the photographs outside the presence of the jury. Upon finding that the district court exercised caution and considered the prejudicial effect of the evidence, this Court found the admission of the photographs not to be an abuse of discretion. Id.

The probative value of these photographs is very slight especially in light of their

gruesome nature. Some of the photographs graphically depict Sheila's tongue after it had been removed from her body by the medical examiner during the autopsy. 3 App. 699-704. Her tongue and body were not in this condition at the crime scene, but rather the act of cutting the organ from Sheila's throat occurred during the medical examination. These photographs are extremely disturbing as the tongue is rarely viewed in such state and the sight is shocking. The probative value of the photographs is minimal as the cause of death was not contested and the medical examiner could have given a verbal explanation of hemorrhages without use of the photographs. In the alternative, the photographs could have been cropped to show only the hemorrhages instead of the entire tongue. See e.g. 3 App. 697-98 (showing only a portion of the tongue with hemorrhages). The district court abused its discretion in overruling Flowers' objection to these photographs. 2 App. 353.

Likewise, the district court abused its discretion in introducing, over objection, other graphic photographs from the autopsy. 2 App. 353; 3 App.705-13. For example, an exhibit shows Sheila's neck after it has been sliced open and the skin is peeled back and held in place by two gloved hands. 2 App. 354; 3 App. 707. The point of this photograph was to show hemorrhages to the neck, but this same point could have been established by showing a cropped photograph which focused on the hemorrhages rather than the two hands placed inside of the neck and other body tissues.

Unlike the district court in Dearman, the district court judge here did not review the offered photographs outside the presence of the jury, did not carefully review the proposed photographs individually to determine if they were unduly prejudicial, did not hear testimony by the pathologist outside the presence of the jury as to why the photographs would be helpful, and did not consider the admissibility of the photographs outside the presence of the jury. In other words, the district court here did not exercise any of the caution exercised by the judge in Dearman and instead abandoned his decision making role to the witness as he asked the simple question of "Doctor, did you go through all of the photos that were available and pick out a minimum number that could demonstrate each of the points you needed to make." 2 App. 353. Upon the medical examiners summary statement that "Yes, I did do

that, sir", the district court overruled the objection. 2 App. 353.

A review of the medical examiner's testimony reveals that admission of several of the photographs was entirely unnecessary. For examples, exhibits 104 and 105 show the tongue after it was removed from the body. 3 App. 699-704. Neither of these photographs was discussed by the medical examiner during his testimony. 2 App. 354.

This highly inflammatory evidence fatally infected the trial and deprived Flowers of his constitutional right to a fair trial. His judgment must therefore be reversed.

E. The district court violated Flowers' constitutional right to present evidence by precluding Kinsey from testifying that the victim told him she was seeing someone named "Keith."

Flowers's state and federal constitutional right to due process, right to a fair trial, and right to present evidence were violated because the district court prohibited Flowers from introducing evidence that Sheila's boyfriend knew of her relationship with Flowers. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

This Court reviews a district court's determination of whether proffered evidence fits an exception to the hearsay rule for abuse of discretion. See Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006). The erroneous exclusion of a defendant's proffered evidence violates a defendant's right to present evidence. Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In such cases, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Chapman, 386 U.S. at 23-24.

2. Flowers was entitled to present evidence in support of his defense.

During the State's case-in-chief, it elicited testimony from Debra that Sheila did not like older men, Debra talked about everything with her daughter, and Debra did not ever see Sheila talking to Flowers, having contact with him or anything like that. 2 App. 379. The State also elicited testimony that Debra was aware of Sheila's friendship with Quinse, though she did not know of their sexual relationship. 2 App. 382-83. The State also elicited testimony from Sheila's cousin, Ameia Fuller, about the fact that she had telephone conversation with Sheila prior to her death and Ameia knew that Sheila was involved with

Chicken (Brass). 2 App. 492-93. Ameia told the detectives that Sheila told Ameia that she was friends with Chicken. 2 App. 493. Flowers attempted to elicit similar testimony from William Kinsey, who was one of Sheila's boyfriends. 3 App. 541. Specifically, Flowers wished to elicit testimony from Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is Flowers' middle name and the name he used). 3 App. 541. The district court sustained the State's hearsay objection to this testimony after noting that Kinsey did not ever personally observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3 App. 541-43.

Due process requires that the "minimum essentials of a fair trial" include a "fair opportunity to defend against the State's accusations" and the right "to be heard in [one's] defense." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). When a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation. Id. at 302. The erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) (citing Chambers, 410 U.S. at 294).

"The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294.

The testimony Flowers sought to introduce from Kinsey was no different than that elicited by the State from Ameia Fuller and was similar to the testimony that the State elicited from Debra. The State opened the door to testimony about knowledge of Sheila's relationships based upon conversations of the State's witnesses with Sheila, so Flowers was entitled to elicit similar testimony from his witness. Under these circumstances, Flowers was prejudiced by the district court's refusal of evidence which would have contradicted the evidence presented by the State concerning Sheila's relationships. This evidence was essential to explaining the presence of Flowers' semen, which was in turn crucial to

establishing that Flowers did not sexually assault and kill Sheila. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers' right to remain silent.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of extensive prosecutorial misconduct. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

"When considering claims of prosecutorial misconduct, this court engages in a two step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. __, 196 P.3d 465, 476 (2008) (citing U.S v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then we apply the Chapman v. California standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict." Id. (citing Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); Harlow, 44 F.3d at 1265).

"Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct." Valdez, 196 P.3d at 477. "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." Id. (citing Chapman, 386 U.S. at 21, 24; Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct so infected the trial with unfairness as to make the

resulting conviction a denial of due process." Id. (internal quotations to Darden v. Wainwright, 477 U.S. 168, 181 (1986) and Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) omitted).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." Valdez, 196 P.3d at 477 (citing Olano, 507 U.S. at 731-32). "Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury.'" Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)). "When an error has not been preserved, this court employs plain-error review." Id. (citing Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Id. (internal quotation omitted) (citing Green, 119 Nev. at 545, 80 P.3d at 95 and Olano, 507 U.S. at 734).

2. The prosecutor commented on Flowers's right not to testify and to remain silent.

The State made numerous direct and indirect comments concerning Flowers' decision not to testify and not to talk with detectives:

> When Christina Paulette tested the swabs that were taken from Sheila's vagina and from her panties, whose DNA did she find? She found George Brass, the person who came in here, swore to tell the truth, and told you yeah, I had sex with Sheila that day. I had sex with her in the morning, and then I went to work. He didn't have to tell you that, but he did.
>
> . . .
>
> Now, George Brass was spoken to by the police. He could have said no, I'm not talking, I have nothing to say. Remember he's in custody. But he voluntarily spoke to the police and said, yeah, I had sex with her and then I went to work. George Brass who was in custody could have said hell, no, I'm not giving you a DNA sample, but he did. He voluntarily gave a DNA sample.
>
> If he had not told them, yeah, I had sex with her that day, if he had not given a sample, we would be in the same place we were six months ago, a year ago, two years ago, three years ago and have no idea who the other sample was.
>
> George Brass who has nothing to gain by being cooperative and basically everything to lose because the truth, and in fact, his DNA is found in the vagina of a girl who had just been murdered.

> He voluntarily gives a statement, gives a sample and then comes in here to testify. He had nothing to hide. He told us that he was at the apartments that morning, he told us that he was living there, but he saw Sheila that morning, he went into her apartment and he had sex with her he thought between 10:30, 11 o'clock and then he went to work.

3 App. 595.

> Well, what happens when the police finally show up on George Brass's door step? He tells them, yeah, I've had a sexual assault with Sheila that's been going on a long time. He doesn't ask for a lawyer, he doesn't ask to remain silent. he's sitting in custody, but when the police come and ask him, he gives it up. He says I had this relationship.....
>
> . . .
>
> And certainly when you have Brass's demeanor and his willingness to cooperate with the police, you can pretty much disregard that as rank speculation, which you're not supposed to do in this case.

3 App. 612.

> By contrast, what was Mr. Flowers' response to the police when they started asking him about Sheila Quarles' murder. Mr. Flowers, do you know someone by the name of Debra Quarles? No response. They shows him a photo. Mr. Flowers, do you know Debra. Do you know this woman. I'm not saying.
>
> MR. PIKE: Objection, Your Honor.
>
> THE COURT: What's the objection?
>
> MR. PIKE: Edwards versus State, post-Miranda silence.
>
> THE COURT: Well, he wasn't silent. He was cooperative with the police and he was discussing the matter with him. He just didn't say anything as to that particular question. If he exercised his right to remain silent, of course you would have that right. Go ahead.

3 App. 613. See also 2 App. 386-87, 480-81; 3 App. 531 (testimony that Robert Lewis voluntarily gave a DNA sample and talked to police for about an hour).

A prosecutor's direct comment on a defendant's failure to testify, violates the defendant's constitutional right against self-incrimination. Bridges, 116 Nev. at 764-64, 6 P.3d 1008-09 (citing Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991)). See also Griffin v. California, 380 U.S. 609, 613-14 (1965) (comment on the refusal to testify is a remnant of the inquisitorial system and violates the Fifth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (the Fifth Amendment applies to the states through the Fourteenth Amendment). Even if the remark was an indirect reference, it would be impermissible if "the

language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." Id. (citing Harkness and U.S v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

Although Flowers's trial counsel did not object to the indirect commentary on the fact that Flowers did not testify or talk with the police, as they emphasized Brass's decision to talk and to testify, this issue should be considered as a matter of plain error. See Harkness, 107 Nev. at 803, 820 P.2d at 761. "Where, as here, appellant presents an adequate record for reviewing serious constitutional issues, we elect to address such claims on their merits." Id. (citing Edwards v. State, 107 Nev. 150, 153 n.4, 808 P.2d 528, 530 (1991)). The jury would naturally and necessarily take this to be a comment on Flowers's failure to testify. Under the facts of this case, which are far from overwhelming, Flowers was prejudiced and the judgment should be reversed. See Herrin v. U.S., 349 F.3d 544, 546 (8th Cir. Mo. 2003).

Additionally, the admission of just a portion of Flower's statement regarding this case also evolved into an improper comment on Flowers' silence in violation of the Fifth Amendment. See Miranda v. Arizona, 384 U.S. 436 (1966); Neal v. State, 106 Nev. 23, 787 P.2d 764 (1980); Doyle v. Ohio, 426 U.S. 610 (1976).

The State's improper commentary on Flowers' lack of cooperation, refusal to talk with the police about this case, and failure to testify was highly prejudicial as it contrasted Flowers with Brass and suggested that Brass was not guilty because he gave a statement and testified. As the other evidence equally inculpated both men, Flowers was greatly prejudiced by this argument. The judgment of conviction must therefore be reversed.

G. There is insufficient evidence to support the conviction.

Flowers' state and federal constitutional rights to due process and conviction only upon presentation of proof beyond a reasonable doubt were violated because there is insufficient evidence to support the conviction. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

1. Standard of Review

Claims of insufficient evidence are reviewed de novo. See U.S. v. Shipsey, 363 F.3d

962, 971 n.8 (9th Cir. 2004), U.S. v. Naghani, 361 F.3d 1255, 1261 (9th Cir. 2004). There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). When determining whether a verdict was based on sufficient evidence to meet due process requirements, this Court will inquire whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. Mitchell v. State, 124 Nev. __, 192 P.3d 721, 727 (2008).

2. There is insufficient evidence that Flowers sexually assaulted and murdered Sheila.

The evidence supporting Flowers' conviction fails to establish beyond a reasonable doubt that he sexually assaulted and murdered Sheila. As noted above, a simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. Also as set forth above, the evidence concerning the Coote case fails to establish Flowers guilt in this case. There were substantial differences between the two cases so the probative value of the Coote evidence is weak. As there is insufficient evidence to support the conviction, it must be vacated.

H. The judgment should be vacated based upon cumulative error.

Flowers's state and federal constitutional rights to due process, equal protection, and right to a fair trial were violated because of cumulative error. U.S. Const. amend. V, VI,

XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); U.S. v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgement. Flowers incorporates each and every factual allegation contained in this appeal as if fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Flowers of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Flowers. He requests that this Court vacate his judgement and remand for a new trial.

VI. CONCLUSION

For each of the reasons set forth above, Flowers is entitled to a new trial. In the alternative, there is insufficient evidence to support his conviction and his judgment should be vacated.

DATED this 19th day of December 2009.

Respectfully submitted,

By: /s/ *JoNell Thomas*

JONELL THOMAS
State Bar No. 4771

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of December, 2009.

By: /s/ *JoNell Thomas*

JoNell Thomas

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 26th day of October, 2009 a copy of the Appellant's Opening Brief was served as follows:

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